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# Supreme Court of the United States

**OCTOBER TERM, 1940.**

**No. 1071**

AMERICAN-WEST AFRICAN LINE, INC.,
(Defendant-Appellant below)
Petitioner,

—against—

JOHN A. LYDECKER, Executor of the Estate of JOHN BERNARD FRYE, deceased,
(Plaintiff-Respondent below)
Respondent.

## *Statement as to Jurisdiction.*

GEO. WHITEFIELD BETTS, JR.,
WILLIAM LOGAN, JR.,
*Counsel for Petitioner.*

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Respondent.

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## *Statement as to Jurisdiction.*

In accordance with Rule 12 of the Supreme Court of the United States, petitioner submits the following as the basis upon which it is contended that this Court has jurisdiction to review the judgment:

(a) The statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, Section 240 (a), as amended by the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938 (U. S. C. A., Title 28, Section 347 (a)).

(b) This action is brought under Section 33 of the Merchant Marine Act of 1920, Title 46, United States Code Annotated, Section 688, commonly known as the "Jones Act" which incorporates by reference the Railroad Employers' Liability Act, Title 45,

United States Code Annotated, Sections 51 and 59, which are as follows:

Section 688, Title 46, U. S. C. A.—Jones Act.

"RECOVERY FOR INJURY TO OR DEATH OF SEAMAN. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, *and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.)" (Italics ours.)

Section 51, Title 45, U. S. C. A.—Railroad Employers' Liability Act.

"LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any

of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, *for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee,* for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, §1, 35 Stat. 65.)" (Italics ours.)

Section 59, Title 45, U. S. C. A.

"SURVIVAL OF RIGHT OF ACTION OF PERSON INJURED. Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, *for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee,* but in such cases there shall be only one recovery for the same injury. (*Apr. 5, 1910, c. 143, §2, 36 Stat. 291.)

* 'Apr. 22, 1908, c. 149, §9;' should be inserted." (Italics ours.)

(c) The date of the judgment of the Supreme Court, New York County, sought to be reviewed herein is January 10th, 1941 (R., pp. 422-423). The order denying petitioner leave to appeal to the Court of Appeals by that Court was entered on March 21st, 1941 (R., pp. 437-438). The date upon which the petition for writ of certiorari is presented is May 19th, 1941.

(d) The action was brought on behalf of a dependent niece to recover damages for the death of John Bernard Frye, Chief Officer of petitioner's S. S. "Padnsay" (R., p. 9).

The complaint and bill of particulars fail to allege that decedent left no surviving widow or children, nor is it alleged that decedent left no parents. Respondent was requested in Paragraph 28 of petitioner's order for a bill of particulars to

> "State what relatives, heirs at law and next of kin plaintiff's intestate left surviving him at the time of his death, giving their names and addresses" (R., p. 17).

and in his bill of particulars the respondent stated:

> "The plaintiff is not making any claim for other relatives, and hence this question is immaterial to this case" (R., p. 21).

The clear import in this allegation is that he left other relatives who would be entitled to recover under the Statutes, and petitioner has no knowledge that deceased's parents did not survive him.

The record is absolutely barren of any evidence from which even an inference may be drawn that

decedent left no mother or father. It is axiomatic that the burden of proof is on the respondent, yet in his answering brief on appeal, page 39, in the Appellate Division respondent conceded: "There is no proof that the deceased left no parents * * *."

After plaintiff's case a motion was made to dismiss the complaint for lack of proof and the court reserved decision on the motion (R., p. 164). This motion was renewed and denied at the end of the entire case and a similar motion to dismiss the complaint for lack of proof on all the evidence was also denied (R., p. 338).

The court correctly charged the jury by reading to it the applicable sections of the Jones Act and Title 45, Section 51, United States Code Annotated, and admonished the jury to be very careful to remember the statutes upon which the action was based (R., pp. 344-346).

A motion was made to dismiss the complaint after the jury's verdict which was denied and the court failed to set aside the verdict unconditionally (R., pp. 374, 416). The Court's opinion on this motion is attached hereto as Exhibit A. Although it is not necessary to take exceptions to the denial of these motions under New York Civil Practice Act, Sections 445, 446, exceptions were taken at the trial (R., pp. 164, 338).

These motions raised the question of the sufficiency of the proof under the Federal Statutes and decisions of this Court. The cases petitioner relies on which hold that the last named beneficiaries under the statute can only recover upon proof of the absence of other classes of beneficiaries are:

*Sabine Towing Co.* v. *Brennan, et al.*, 85 F. (2d) 478, C. C. A.;

*New Orleans & N. E. R. R. Co.* v. *Harris,* 247 U. S. 367;
*Beebe* v. *Moormack Gulf Lines, Inc.,* 59 F. (2d) 319, cert. den. 287 U. S. 597;
*Maitland* v. *Greenberg,* 182 App. Div. 929;
*Boyle* v. *Southern R. Co.,* 36 Misc. 289;
*Cole* v. *Mayne,* 122 Fed. 836;
*Louisville, Evansville & St. Louis Consolidated Railroad Company* v. *Lohges,* 6 Indiana Appellate Reports 288.

The lack of proof warrants a dismissal of the complaint. *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U. S. 654.

The trial court also erred in failing to dismiss the complaint after plaintiff's case, after the entire case and after the jury rendered its verdict as a matter of law because the uncontradicted and corroborated evidence established that the deceased was responsible to petitioner for the proper condition of the equipment used during the unloading of the vessel, that he failed to report any defect in this equipment to the Chief Engineer, although it was his duty to do so (R., p. 126) and that the accident was the result of his sole negligence. Cases which sustain petitioner's position on this point are:

*St. Louis* v. *Simpson,* 286 U. S. 346;
*DeLuca* v. *Shepard S. S. Co.,* 65 F. (2d) 566; op. mod. 67 F. (2d) 437; cert. den. 291 U. S. 685;
*New York Central* v. *Marcone,* 281 U. S. 345;
*West Kentucky Coal Company* v. *Parker's,* 229 Ken. 685;
*Horse Creek Mining Company* v. *Frazier's Administrators,* 224 Ken. 211.

The trial court refused to grant a motion for a mistrial when a question was read on behalf of respondent which was clearly improper as it implied an admission of liability on behalf of the petitioner (R., p. 222). The damage was not undone by the Court's admonition to the jury to disregard the question.

*Bassens* v. *New York Central Railroad Co.*, 201 App. Div. 191;
*Manigold* v. *Black River Traction Co.*, 81 App. Div. 381;
*Stein* v. *B'klyn, Q. Co. & Suburban R. R. Co.*, 62 Misc. 309.

The jury were also prejudiced by respondent's improper summation (R., pp. 342-343) and practice similar to that indulged in on behalf of respondent has been vigorously condemned.

*Bagully* v. *Morning Journal Assn.*, 38 App. Div. 522;
*People* v. *Johnson*, 284 N. Y. 182.

(e) This court has jurisdiction to entertain the appeal taken herein.

*Chicago G. W. R. Co.* v. *Rambo*, 298 U. S. 99;
*Atchison, Topeka & Sante Fe Ry.* v. *Saxon*, 284 U. S. 458;
*Chicago, M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472;
*St. Louis* v. *Simpson*, 286 U. S. 346;
*Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
WILLIAM LOGAN, JR.,
*Counsel for Petitioner.*

## Exhibit A.

*Opinion Rendered by the Trial Justice on Petitioner's Motion to Set Aside the Verdict and Dismiss the Complaint, Decided February 26th, 1940 (Not Reported).*

*Lydecker, adm'r of estate of John Bernard Frye, dec'd* v. *American-West African Line, Inc.*—On motion to set aside verdict and to dismiss complaint. Motions disposed of as indicated.

Motion by defendant to set aside verdict and to dismiss complaint, upon which decision was reserved.

Plaintiff recovered a verdict of $15,000 on two causes of action, viz, $7,500 on each cause of action. Defendant moves to set aside the verdict as excessive and against the weight of the evidence and to dismiss the complaint.

Plaintiff's intestate was fatally injured aboard defendant's vessel, due, it is claimed, to the defendant's negligence. He left him surviving a niece of minor age who was wholly and solely dependent upon him for support and maintenance, and the evidence establishes that he contributed the sum of $50 a month for such support and maintenance, and there is also some evidence that at times he gave her fifty cents or a dollar, and occasionally bought her some clothes, although no definite amounts were testified to. The evidence also establishes that decedent's injuries were of a very severe nature and that he consciously suffered excruciating pain and agony for three hours or more before death.

On the question of negligence it is the judgment of this court that an issue was raised for the considera-

tion of the jury and that the facts sufficiently sustain the verdict rendered.

In contending that the verdict is excessive defendant urges that its largeness is the result of prejudice created by plaintiff's counsel in reading from the deposition of Captain Seay a question which defendant claims must have conveyed to the jury the impression that defendant acknowledged liability for the accident, and also that plaintiff's counsel in his summation stated that the United States Supreme Court had sustained an award of substantial damages for pain and suffering and that such remark must have resulted in a like prejudicial effect.

When the question was read defendant moved for a mistrial, which was denied, and the jury instructed to disregard the question. Similarly, upon objection to the mentioned statement in summation, the jury was instructed to disregard the statement, but no motion for mistrial was then made. None the less, if the verdict is the result of prejudice it should be set aside. On the other hand, the rule is well settled that, generally, a court should not disturb a verdict which is plainly perceived to be right and amply sustained by the evidence, even though there may have been, during the course of the trial, a departure from rigid adherence to the prescribed standards of propriety relating to the conduct of counsel, at least in the absence of some definite proof, as distinguished from mere assertion, that the verdict is the result of prejudice (*Fitzgerald* v. *N. Y. Central R. R.*, 215 App. Div. 1). It is realized that counsel, in the heat of trial, may be carried away by an excess of zeal, or inadvertence, but unless his conduct is persistent and continuous and his fault flagrant, it will not justify setting aside the verdict (*Halpern* v.

*Nassau Elec. R. R.*, 16 App. Div. 90, 94). In the *Halpern* case the court said: "We by no means intend to say that every irrelevant or improper comment made by a counsel through inadvertence or excess of zeal would require or justify setting aside a verdict, but in this case the conduct of the counsel was persistent and continuous, and his fault flagrant." Such a situation is not present here.

For the reasons presently stated I am of the opinion that the verdict did not result from prejudice, and is not excessive but is reasonable in amount, except with respect to the first cause of action, *i. e.*, for loss of support and maintenance. As to this I feel it should be reduced to the sum of $4,000, not because the sum of $7,500 awarded is the result of prejudice, but because I am of opinion that the indefinite and prospective damages awarded are too high, even though in this class of cases the amount of indefinite, prospective and contingent damages to be awarded is left to the reasonable discretion of the jury (*Houghkirk* v. *President, &c., Delaware & Hudson Canal Co.*, 92 N. Y. 219, 225; *Countryman* v. *Fonda, J. & G. R. Co.*, 166 N. Y. 201, 209). In the *Houghkirk* case the court said that it is recognized that in this class of cases the damages to the next of kin are necessarily indefinite, prospective and contingent and that "they cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded." And in the *Countryman* case the court said that "it is a question for the jury to determine, in the exercise of a reasonable discretion, what damages the next of kin of the intestate have suffered, if any, considering the situation as proved." * * * "In other words, they are permitted to consider in a reasonable way those prospective and

indefinite damages arising from the death * * *, in addition to the actual money damages as proved."

As stated, the evidence establishes that the dependent niece received from decedent $50 a month, and assuming that he worked during the five years and seven months until the niece attained her majority, the total sum of which she has been deprived would amount to $3,350. As to the additional sums given her by decedent at intervals and money expended in buying her clothes, while no definite amounts were stated, it still is a recoverable item of damage, though in the realm of indefiniteness (*Houghkirk* and *Countryman* cases, *supra*), but there appears to be a sufficient basis for the recovery of damages in some amount (*Bitondo* v. *N. Y. Central R. R.*, 149 N. Y. Supp. 339; see also *Bruckshaw* v. *Chicago R. Co.*, 155 N. W. 273, reversed on other grounds), and I think a verdict of $4,000 is fair and reasonable.

The award of $7,500 for decedent's conscious pain and suffering for over three hours before death is not large but reasonable in amount, and cannot be said to have been the result of prejudice and is consistent with the holding in *St. Louis & Iron Mountain R. R.* v. *Craft* (237 U. S. 648), where the court held that an award of $5,000 for approximately thirty minutes' suffering was not excessive.

The motion to set aside the jury's verdict of $15,000 in favor of plaintiff as excessive is granted, unless the plaintiff stipulates to a reduction of the verdict to the sum of $11,500. The motion to dismiss the complaint is denied.